appeal from a criminal conviction. The judgment of the three-judge District Court denying plaintiff's motion for summary judgment and an injunction, and granting summary judgment for defendants, was entered on February 18, 1965 (R59). Plaintiff's motion to set aside the summary judgment was denied on May 17, 1965 (R72). Notice of Appeal was filed in the District Court on June 11, 1965 (R73). The Jurisdictional Statement and the motion for leave to proceed *in forma pauperis* were filed on August 10, 1965. On January 24, 1966, this Court noted probable jurisdiction, transferred the case to the appellate docket, and granted the motion to proceed *in forma pauperis* (R76). The jurisdiction of the Court to review these decisions by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b).

Questions Presented

May a State constitutionally impose a financial condition upon an indigent prisoner's right to have a free transcript needed for an appeal from a criminal conviction.

If a State may impose such a condition upon indigent prisoners, may it discriminatorily impose this condition only upon some in that class.

Statutes Involved

New Jersey Laws of 1956, c. 134, pp. 555-6, secs. 1, 2, and 3 (N.J.S. 2A:152-17, 18, 19) provide as follows:

"N.J.S. 2A:152-17. *Payment of transcripts for indigent defendants in criminal cases*

Any person convicted of any crime may make application under oath to any judge of the County Court or Law Division of the Superior Court of the county where the venue was laid showing that a copy of the transcript of the record, testimony and proceedings at the trial is necessary for the filing of any application with the trial court, and that he is unable, by reason of poverty, to defray the expense of procuring the same, and any such judge may, being satisfied of the facts stated and of the sufficiency thereof, certify the expense thereof to the county treasurer, who shall thereupon pay such expense, the amount thereof having been approved by the judge to whom such application was made. Where such person appeals to the Appellate Division of the Superior Court and copies of the transcript of the proceedings in the trial court are needed therefor he may make a similar application to such court which, being satisfied of the facts stated and the sufficiency thereof, may certify the expense and amount thereof to the county treasurer who shall thereupon pay such expense. L. 1956, c. 134, p. 555, §1.

"N.J.S. 2A:152-18. *Reimbursement*

The county treasurer shall file a notice of said payment and the amount thereof with the institution in which said person, upon whose application the tran-

script of the record was prepared, is confined, and, to the extent of the expense incurred, the county treasurer shall be reimbursed from any institutional earnings of such person, in the event that the application for relief is denied by the trial court or an appellate court. L. 1956, c. 134, p. 555, §2.

"N.J.S. 2A:152-19. *Effective date*

This act shall take effect January 1, 1957. L. 1956, c. 134, p. 556, §3."

Statement

Appellant Joseph A. Rinaldi is presently confined as an inmate at the New Jersey State Prison as the result of two separate criminal convictions: the first in 1959; the second in 1960 (R37). The sentences imposed for those convictions amount to an aggregate term of 13 to 20 years (R37, 38).

Rinaldi appealed *in forma pauperis* from his 1960 conviction, leave to so proceed having been granted by the Appellate Division of the New Jersey Superior Court (R38). His petition for a free transcript of the testimony and proceedings in the trial court was granted by the Appellate Division by Order of June 21, 1960 (R38, 43-4). That Order directed that the cost of the transcript be paid by the Treasurer of Essex County (in which Rinaldi had been tried) and also directed (R44):

"The Essex County Treasurer, pursuant to N.J.S. 2A:157-18 (actually 2A:152-18) shall file a notice of said payment and the amount thereof with the keeper or warden of N. J. State Prison, Trenton, N. J. to the

> end that the Treasurer shall be reimbursed from the institutional earnings of the defendant, upon the filing of an appropriate order, in the event the defendant's application for relief is denied."

At the time he appealed his 1960 conviction Rinaldi was aware of the existence and impact of the New Jersey reimbursement statute (R37, 42).

Rinaldi's 1960 conviction was affirmed by the Appellate Division (R46-7). His petition to the New Jersey Supreme Court for certification was denied, as was his petition to this Court for a writ of certiorari. *Rinaldi* v. *New Jersey,* 371 U.S. 847 (1962) (R38). In November, 1963 the New Jersey State Prison began to withhold appellant's institutional wages to reimburse the Essex County Treasurer for the $215.00 cost of the 1960 transcript (R39). Since appellant's institutional wages are only 20 cents per day, or $1.00 per week (R39), it will take Rinaldi several years to pay the cost of the 1960 transcript.

In January, 1964 Rinaldi commenced this action by filing a Complaint *pro se* (R1-11). Counsel was assigned to represent him (R54) and moved for summary judgment (R17). In support of the motion, plaintiff filed certain Requests for Admissions (R22, 26) and answers thereto (R34, 35) which established that several other New Jersey State Prison inmates whose convictions had been affirmed on appeal had not had their institutional wages withheld to reimburse the Counties in question for the cost of their transcripts. Rinaldi also filed an affidavit, the facts of which were not denied by any of the defendants, that he had been allowed to keep the transcript for a period of about one month, after which he returned it to County authorities, and that the Essex

County Clerk had advised him that "the law allows you to retain this transcript for a period of thirty days only . . ." (R18-21).

Upon the summary judgment motion, Rinaldi requested: (1) that N.J.S. 2A:152-18 be declared unconstitutional as violative of the Thirteenth and Fourteenth Amendments; (2) that the transcript be returned to him; (3) that all wages withheld be returned and that no future reimbursement be made from his wages; and (4) in the event N.J.S. 2A:152-18 not be declared unconstitutional, that all wages withheld be returned and that no future reimbursement be made on the grounds that the reimbursement statute was being administered in a discriminatory fashion against him.

Chief Judge Biggs of the Third Circuit, pursuant to Title 28, United States Code, Section 2284, appointed a three-judge court to hear the matter (R54). Plaintiff's motion was denied and summary judgment was granted in favor of the defendants (R59). Thereafter, plaintiff moved to set aside the summary judgment on the grounds that there was a substantial controversy as to a material fact, i.e., whether the application of N.J.S. 2A:152-18 subjected plaintiff to cruel and unusual punishment in violation of the Eighth Amendment (R60). The same three-judge court denied that motion and this appeal was then taken (R72, 73). The thrust of both the opinions below is that Rinaldi's rights under the Eighth, Thirteenth and Fourteenth Amendments had not been violated by the existence or the administration of the reimbursement statute.

Summary of Argument

The reimbursement statute sustained by the Court below imposed a financial condition upon the indigent defendant's right to an appeal from a criminal conviction. Although this condition is somewhat sophisticated in form and is imposed in a manner somewhat different than those conditions already stricken by this Court, the statute still acts as an inhibiting agent in the area of appellate review by indigents and penalizes those indigents who seek to prosecute appeals. Moreover, even if the statute was not unconstitutional, it is being applied in a blatantly discriminatory fashion against this indigent prisoner. Not only is there discrimination in this particular case, but the very statute itself necessarily establishes invidious discrimination among various classes of prisoners.

ARGUMENT

I.

The Reimbursement Statute Imposes a Financial Condition Upon the Indigent Prisoner Which Denies Him Due Process and Equal Protection in Seeking Appellate Review.

The matter on appeal developed as a result of New Jersey's legislative response to the decision in *Griffin* v. *Illinois*, 351 U.S. 12 (1956). *Griffin* held that an indigent defendant who had been convicted of a crime had been deprived of his Fourteenth Amendment rights of due process and equal protection because of the failure of the State of Illinois to provide him with a free transcript needed for an appeal.

Prior to *Griffin*, New Jersey had already accorded the right of appeal to a defendant convicted in a criminal action. In order to obtain the desired full appellate review of trial errors, it was necessary to submit a transcript of the testimony at trial. However, with the exception of indigents sentenced to death in capital cases, all others convicted in criminal cases during that period who needed a transcript for appeal had to pay for it, whether indigent or not. *State* v. *Welch*, 46 N.J. 57, 63, 214 A.2d 857, 860 (1965). Free transcripts for those sentenced to death has been permitted by statute since 1952. L. 1952, c. 212, p. 743, sec. 2; N.J.S. 2A:152-16.

In the year following *Griffin*, New Jersey enacted N.J.S. 2A:152-17 and 18.[1] N.J.S. 2A:152-17 establishes a procedure whereby an indigent convicted of a crime can secure "a copy of the transcript of the record, testimony and proceedings at the trial" for use either at trial level or before the Appellate Division of the New Jersey Superior Court. If the judge to whom the indigent applies for a transcript is satisfied of the salient facts, he certifies the expense to the County Treasurer who then pays the stenographer's bill. N.J.S. 2A:152-18, the constitutionality of which Rinaldi challenges, deals with reimbursement by the indigent of that expense. It states:

> "The county treasurer shall file a notice of said payment and the amount thereof with the institution in which said person, upon whose application the tran-

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[1] It has been noted that N.J.S. 2A:152-17 and 18 were enacted as the result of *Griffin*. Rossmoore and Koenigsberg, "Habeas Corpus and the Indigent Prisoner," 11 *Rutgers L. Rev.* 611, 614 (1956); Trebach, "A Modern Defender System for New Jersey," 12 *Rutgers L. Rev.* 289, 302 (1957).

> script of the record was prepared, is confined, and, to the extent of the expense incurred, the county treasurer shall be reimbursed from any institutional earnings of such person, in the event that the application for relief is denied by the trial court or an appellate court."

With the exception of the decision below, the constitutionality of this reimbursement statute does not appear to have been examined by any other court, State or Federal, at least by way of a reported opinion.[2]

While the adoption of N.J.S. 2A:152-17 evidences a legislative intent in New Jersey to follow the letter and spirit of *Griffin*, the companion reimbursement statute, N.J.S. 2A:152-18, added a condition which could only serve to discourage applications for transcripts. As was noted by the District Court in the second of the two opinions herein, one of the appellees urged that the reimbursement

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[2] Two decisions have partially reviewed N.J.S. 2A:152-17, the statute which provides for the original payment of the cost of the transcript by the county. *In re Faiola's Petition*, 185 F. Supp. 564 (D.N.J. 1960); *State* v. *Bentley*, 46 N.J. Super. 193, 134 A.2d 445 (App. Div. 1957). Those cases, however, merely indicate that the indigent cannot claim he was denied a stenographic transcript unless he attempts to secure one under the procedure established by N.J.S. 2A:152-17. In *State* v. *Welch*, 46 N.J. 57, 214 A.2d 857 (1965), the New Jersey Supreme Court reviewed a post-conviction proceeding involving an indigent who had been convicted of first degree murder in 1949 and given a life sentence. He filed a notice of appeal from the conviction but could not supply the necessary transcript because of his indigency. The appeal was dismissed. All this occurred before *Griffin* and before New Jersey's enactment of N.J.S. 2A:152-17 and 18. An adequate transcript could not be obtained now since the stenographic notes of the trial had been destroyed. The Supreme Court held the facts of that case brought it within the principles of the *Griffin* case and other subsequent decisions of this Court. The 1949 conviction was vacated and the cause remanded for a new trial.

statute is a "reasonable condition" imposed by the legislature (R68). This concern for the alleged reasonableness of the reimbursement condition permeates the opinions below and forced the District Court to adopt a narrow and restrictive reading of *Griffin*. It also led that court to overlook the fact that several post-*Griffin* decisions clearly indicate that this Court, in deciding *Griffin*, meant to open wide to indigents the door to full appellate review of their convictions without intimidating or inhibiting the indigents' election to appeal by the imposition of any financial consideration whatsoever, no matter what form that condition might take.

A brief review of *Griffin* and the holdings and opinions of this Court's salient post-*Griffin* cases is in order. The rationale underlying the *Griffin* right was expressed by this Court in the following terms:

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: 'To no one will we sell, to no one will we refuse, or delay, right or justice. . . . No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land.' These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guaranties of due process and equal protection both called for procedures in criminal trials which allow no invidious discriminations between per-

sons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' . . .

"Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor. In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. . . .

"There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. . . . But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. . . .

". . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he

has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S., at pp. 16-19.

Griffin was a direct attack on a State procedure based on a State statute. Other States whose restrictive appellate rules for indigents have been set aside by this Court since *Griffin* are Washington, Ohio, Iowa, and Indiana.

In *Eskridge* v. *Washington State Board,* 357 U.S. 214 (1958), this Court held that Washington had denied an indigent his Fourteenth Amendment right (citing *Griffin*) to have appellate review regardless of whether he could afford to pay for the trial record. The Washington procedure which was found to be constitutionally deficient was based on a state statute which allowed an indigent defendant a free transcript only if the trial judge was of the opinion "justice will thereby be promoted." Remington's Wash. Rev. Stat., 1932, §42-5. It was held that the "conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript." 357 U.S., at p. 216. Subsequent to *Eskridge,* the Washington Supreme Court promulgated a set of rules to govern the trial judges in passing on indigents' requests for free stenographic transcripts. Basically, if the trial judge found that the appeal was frivolous he could deny the indigent defendant a free transcript. In *Draper* v. *Washington,* 372 U.S. 487 (1963), this Court struck down the new procedure as violative of the Fourteenth Amendment, comparing it to the *Eskridge* procedure as "a similarly inadequate substitute for the full appellate review available to non-indigents in Washington, when the effect of that [the trial judge's]

finding is to prevent an appellate examination based upon a sufficiently complete record of the trial proceedings themselves." 372 U.S., at pp. 499-500.

In *Burns* v. *Ohio,* 360 U.S. 252 (1959), this Court reviewed the *de facto* denial by the Ohio Supreme Court of an indigent defendant's motion for leave to appeal a felony conviction to that court. The Clerk of the Ohio Supreme Court refused to file the indigent's motion papers because they were not accompanied by a $20 filing fee. This fee was required by Section 1512 of the General Code of Ohio and the Rules of Practice of the Ohio Supreme Court. The State acknowledged that the Clerk's refusal to file the indigent's motion was the equivalent of a final judgment of the highest court in Ohio. The judgment was reversed despite Ohio's argument that the ultimate disposition of any motion for leave to appeal a felony conviction was a matter of discretion for the Ohio Supreme Court, thus distinguishing *Burns* from *Griffin.* This Court rejected this argument saying that it missed "the crucial significance of *Griffin.*"

> "There is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants. Indigents must, therefore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio. . . .
>
> ". . . The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." 360 U.S., at pp. 257-8.

Shortly after *Burns* was decided, this Court reviewed another indigent defendant's claim that Ohio did not pro-

vide him adequate remedy for the prosecution of an appeal from his conviction, since he was required to pay docket fees to the Ohio Supreme Court. The case came to this Court on appeal from the denial of a writ of habeas corpus. This Court held, in a *per curiam* opinion, that the indigent's application for the writ made out a case of deprivation of his constitutional right to the equal protection of the laws of Ohio in respect to the state court appeal. *Douglas* v. *Green,* 363 U.S. 192 (1960).

Smith v. *Bennett,* 365 U.S. 708 (1961), is in the same general category as *Burns* and *Douglas. Smith* involved two habeas corpus cases which successfully challenged the validity, under the Equal Protection Clause of the Fourteenth Amendment, of the requirement of an Iowa Statute which obliged indigent defendants to pay a $4.00 filing fee before applications for writs of habeas corpus or the allowance of appeals in such proceedings would be docketed. This Court rejected every defense of the Iowa procedure offered by the State and ruled that the indigents had been denied equal protection. The decision is summarized in this sentence:

> "We hold that to interpose *any financial consideration* between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." 365 U.S., at p. 709. (Emphasis supplied.)

Lane v. *Brown,* 372 U.S. 477 (1963), is one of the most recent examples of this Court's continuing policy against upholding any State procedure which might prevent or inhibit an indigent's right to a complete and non-discriminatory appeal. The defendant had been convicted of a

crime in an Indiana State Court. After his conviction was affirmed he filed a petition for a writ of error *coram nobis* in the State trial court. He was represented by the Public Defender at the hearing on that petition. The petition was denied. The defendant then requested the Public Defender to represent him in perfecting an appeal to the Indiana Supreme Court. This request was refused because of the Public Defender's stated belief that an appeal would be unsuccessful. The denial of this request had the effect of foreclosing any appeal from the denial of the petition for a writ. The filing of the transcript of the *coram nobis* hearing was required in order to confer jurisdiction upon the Indiana appellate court. State statutes, however, as interpreted by the Indiana Supreme Court, held that only the Public Defender could procure a transcript of a *coram nobis* hearing for an indigent. The upshot of this arrangement was that a person with funds could appeal the denial of a writ of error *coram nobis,* while an indigent, at the will of the Public Defender (an official appointed and paid by the State Supreme Court), was entirely cut off from any appeal. This Court held that this Indiana procedure was "constitutionally deficient" noting:

> "The present case falls clearly within the area staked out by the Court's decisions in Griffin, Burns, Smith, and Eskridge. To be sure, this case does not involve, as did Griffin, a direct appeal from a criminal conviction, but Smith makes clear that the Griffin principle also applies to state collateral proceedings, and Burns leaves no doubt that the principle applies even though the State has already provided one review on the merits.
>
> "In Eskridge the Court held constitutionally invalid a provision which permitted a trial judge to prevent

an indigent from taking an effective appeal. The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all. Such a procedure, based on indigency alone, does not meet constitutional standards." 372 U.S., at pp. 484-5.[3]

The above cases all relate to review by this Court of State statutes or procedures. *Hardy* v. *United States*, 375 U.S. 277 (1964), reviewed Federal criminal court procedure relating to providing indigent defendants with free transcripts. Federal procedure, with the *Hardy* decision, had apparently completed a period of change from a state where indigents were denied free transcripts upon the trial court's certification that the appeal was not taken in good faith to one where free transcripts will be granted in virtually all indigent appeals.[4] The opinions of Justices Clark and Harlan seem to state as much. The majority opinion expressed the view of seven Justices that the indigent's attorney needed a complete trial transcript in order to determine whether "plain error" had been committed. Four Justices added a concurring opinion written by Justice

[3] The District Court herein acknowledged that: "What we are concerned with is a collateral situation which arose out of plaintiff's appeal from his 1960 convictions" (R55).

[4] The recently adopted Criminal Justice Act, Title 18, United States Code, Section 3006A, is but another example of public concern for the rights of the indigent defendant. Among other financial assistance given to the indigent, the Act provides that fees and expenses incurred by the defendant which were necessary to prepare an adequate defense may be paid from public monies appropriated to the United States Courts for this purpose. Title 18, United States Code, Section 3006A (e), (f) and (h). There is no provision in that Act requiring the defendant to reimburse the government for those fees.

Goldberg. It is submitted that the concurring opinion accurately reflects this Court's view on the free transcript question in general, and is of particular significance on this appeal even though it refers to Federal criminal cases:

> "I concur separately, however, to state my conviction that in the interests of justice this Court should require, under our supervisory power, that full transcripts be provided, without limitation, in all federal criminal cases to defendants who cannot afford to purchase them, whenever they seek to prosecute an appeal." 375 U.S., at p. 282.
>
> "I conclude, therefore, that the interests of equal justice and the viability of our adversary system are impaired when an indigent defendant's access to a trial transcript is not as complete as that of a paying defendant. This 'concept of "equal justice" does not confuse equality of treatment with identity of treatment.' It does, however, require the Government to do 'all that can reasonably be required of it to eliminate those factors that inhibit the proper and effective assertion' of the defendant's claims." 375 U.S., at pp. 290-1.

The above cases reflect a pattern and policy to condemn *any* State action which interposes a financial condition, however slight, upon an indigent's direct or indirect appeal of a criminal conviction. This condemnation has already been extended to discrimination against indigents in direct appeals (*Griffin*), habeas corpus cases (*Douglas* and *Smith*), and *coram nobis* matters (*Lane*). The fact that the financial condition may be slight does not protect it: this Court has already stricken the minuscule requirement of $4.00 and $20.00 filing fees (*Burns* and *Smith*).

In spite of the breadth and pattern found in the above decisions, the District Court chose to interpret those cases as being strictly limited to their facts and to insist that they only established a policy permitting indigents to have their appeals heard. The court below appeared satisfied that this Court's restrictions against the imposition of financial conditions on indigent appeals only applied to the actual payment of money by the indigent before the appeal could be heard. There does not appear to be any holding in *Griffin* or the other cases which justifies this limited approach. *Burns,* in fact, held: "The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." 360 U.S., at p. 258. *Smith* reiterated this policy as follows: "We hold that to interpose *any financial consideration* between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny him the equal protection of the laws." 365 U.S., at p. 709. (Emphasis supplied.)

Even if the *Griffin* series of cases had not already implicitly prohibited the imposition of New Jersey's reimbursement condition, N.J.S. 2A:152-18 must be realistically viewed for what it is and for what it does. By requiring an indigent to gamble his institutional wages in order to secure a transcript, the prisoner must weigh the risk of a reversal against the loss of all his prison wages. To what could the failure to appeal under such conditions be attributed other than fear of loss of the small financial cushion his wages provide during the term of imprisonment. This fear would be particularly felt by a person already reduced to indigency. This cannot be due process. The District Court held that the indigent's loss of prison wages "should

be helpful to him retaining or reestablishing his self respect" (R57). The court did not articulate how a person already indigent, once stripped of the twenty-cent daily wage, could then hold his head higher. Had the District Court permitted a full hearing to review the cruel and unusual punishment which the discriminatory enforcement of the reimbursement statute worked on Rinaldi, this point could have been developed in detail.

It is quite clear that the reimbursement statute amounts to nothing more than a sophisticated attempt to avoid the impact of the *Griffin* decision. The reimbursement condition which the statute attaches to the granting of a free transcript is as invidious, in its own way, as all the other financial conditions which this Court has stricken since *Griffin*. Since it denies Rinaldi due process and equal protection, N.J.S. 2A:152-18 should be stricken as unconstitutional.

II.

The Reimbursement Statute Is Discriminatory in Its Application and Is Being Applied in a Discriminatory Manner Against This Indigent Prisoner.

Even if the reimbursement statute was not unconstitutional by virtue of being a prohibited financial condition against appellate review, the very system which the statute necessarily establishes discriminates against the unsuccessful indigent appellant. Having appealed at his own peril, he finds himself discriminated against in favor of: (1) the unsuccessful non-indigent appellant who continues to draw institutional wages; (2) the unsuccessful indigent appellant who has been released from prison before reimbursement is sought against him (the State officials acknowledge

(R24, 35) that this has already occurred in the New Jersey prison system since the adoption of N.J.S. 2A:152-18); (3) an indigent convicted of a capital offense, whose transcript the State provides free of charge (N.J.S. 2A:152-18 does not apply to that type indigent); (4) the successful indigent appellant.[5]

It is clear from the record below that N.J.S. 2A:152-18 is being applied in a discriminatory fashion against Rinaldi. It was admitted below that (1) several unsuccessful indigent appellants from Essex County, where Rinaldi was convicted, are not being subjected to reimbursement (R26-28, 34); (2) several unsuccessful indigent appellants from other Counties in New Jersey are not being subjected to reimbursement (R22-25, 35-6); (3) at least one unsuccessful indigent appellant was paroled without ever having been subjected to reimbursement (R24, 35). All of these indigent prisoners received free transcripts. In its opinions below, the District Court held that the administration of the reimbursement statute is State and County business and relief should be sought "through the proper New Jersey facilities" (R57, 71). Nevertheless, the admitted discriminatory application of a state statute has deprived appellant of his civil rights and, even though a prisoner of the State, entitles him to seek relief under Title 42, United States Code, Section 1983. *Sewell* v. *Pegelow,* 291 F.2d 196 (4th Cir. 1961). Furthermore, the suggestion to seek relief through "New Jersey facilities", if this is taken to mean

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[5] The successful indigent appellant can even be favored over the successful non-indigent appellant who pays for the transcript himself. The Appellate Division of the New Jersey Superior Court is free not to tax the State the cost of the transcript after a reversal of a conviction. R.R. 1:9-2(1) and 2:9-2 of New Jersey Court Rules.

application to State or County administrative bodies, would mean that Rinaldi can only request, not require, the government to treat him as it has treated others in his class. This would be the antithesis of due process.

As further evidence of the discrimination being practiced against Rinaldi, the record below is clear that even though the State and County officials are seeking to make Rinaldi pay for the trial transcript, pursuant to the reimbursement statute, he was only allowed to keep the transcript for about one month (R18). It would appear as if the officials administering the statute are stretching it to its breaking point.

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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